80-1643

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ALEXANDER L. STEVAS,
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NO. 80-

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

SILVER BULK SHIPPING, LTD.

Petitioners,

v.

WILLIAM McCARTHY

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petition For Writ Of Certiorari

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LISTING IN COMPLIANCE WITH RULE 28.1

1. Dene Shipping Co., Ltd. is the parent company of Petitioner, Silver Bulk Shipping, Ltd.

2. Silver Line, Ltd. and Denholm Ship Management, Ltd. are affiliated companies of Petitioner, Silver Bulk Shipping, Ltd.

RAWLE & HENDERSON

By: Robert Blair White, Jr.
Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Do the 1972 Amendments to the Longshoremen's & Harbor Worker's Compensation Act, 33 U.S.C. §905(b), place a duty on a vessel owner to remove frozen sugar from the ribs of its vessel's hatches which may have become frozen as a result of the vessel's negligence where: (1) the stevedoring company was retained to discharge all sugar cargo from the vessel's hatches and its employees were paid a special increased rate to remove the frozen cargo; (2) the presence of frozen sugar in a vessel's hatch is a common condition frequently dealt with by stevedoring companies and longshoremen; and (3) the stevedoring company had exclusive control of the hatch at all pertinent times and its contract

with the vessel precluded vessel personnel from entering the hatch to remove the frozen sugar?

2. May a vessel owner properly be precluded from presenting evidence and argument that the stevedoring company breached its duty of care and that such breach was the sole proximate cause of the plaintiff's injuries in a suit brought by a longshoreman under the 1972 Amendments to the Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. §905(b)?

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OPINIONS BELOW

The judgment of the United States District Court for the Eastern District of Pennsylvania was affirmed by the United States Court of Appeals for the Third Circuit in a Judgment Order dated December 12, 1980. A copy of that Order is attached in the appendix (App. 1A). The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 487 F. Supp. 1021 (E.D. Pa. 1980). That opinion is set forth in the Appendix. (App. 2A).

JURISIDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) to review a judgment of the United States Court of Appeals for the Third Circuit dated and entered on December 12, 1980.

STATUTE INVOLVED

Longshoremen's & Harbor Workers' Compensation Act, as amended in 1972, 33 U.S.C §905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third-party in accordance with the provisions of §933 of this Title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not based upon the *warranty of sea-*

> worthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

Respondent, McCarthy, brought this action in the United States District Court for the Eastern District of Pennsylvania against Petitioner, Silver Bulk Shipping, Ltd., (hereinafter "Silver Bulk") to recover damages for personal injuries sustained onboard Petitioner's vessel, M/V SILVERTWEED. McCarthy claimed damages resulting from an accident on January 6, 1977, which occurred while he was discharging a cargo of sugar from M/V SILVERTWEED in the course of his employment as a longshoreman with Amstar Refinery. This action is governed by the

Longshoremen's & Harbor Workers' Compensation Act, Section 5(b) as amended, 33 U.S.C. §905(b), which requires that he establish all elements of a negligence cause of action against Silver Bulk in order to recover. Jurisdiction in the United States District Court for the Eastern District of Pennsylvania was pursuant to 28 U.S.C. §1332.

The M/V SILVERTWEED arrived at the Amstar Refinery Pier in Philadelphia, Pennsylvania on December 24, 1976, laden with a cargo of bulk raw sugar from two Australian ports. On December 27, 1976, longshoremen employed by Amstar, including McCarthy, commenced discharging the bulk sugar out of the vessel's forward hatches according to a procedure established by Amstar and without any consultation with or participation by vessel personnel. Indeed, the collective bargaining agreement governing McCarthy's

employment and which was incorporated in the contract between Amstar and the vessel's charterer precluded participation by vessel personnel in the discharging operation.

The first step in the procedure was to position the large clam shell bucket of an Amstar owned and operated floating crane over the hatch opening or "square" of the hatch being discharged. Then, the bucket was lowered into the hold where it picked up sugar from the center of the hatch. The loaded bucket was then removed from the hold and the sugar deposited on the pier. This continued until a large "V" had been created in the sugar, the vertex of which was located approximately fifteen to eighteen feet below the underside of the hatch coaming.

The second step consisted of lowering bulldozers into the hatch. With

these, the longshoremen pulled sugar from the wings (outer parts) of the hold and filled the "V", thereby creating a nearly even surface of sugar six to ten feet below the underside of the hatch coaming.

In the third step, individual longshoremen (of whom McCarthy was one) removed sugar from the sides of the bulkheads, beams and framing ("ribs") which could not be reached by the bull-dozers. Thereupon, the clam shell bucket again was lowered into the hold, a new "V" was created and the entire three step procedure repeated until the entire cargo was discharged.

The hatch in which McCarthy's accident occurred, hatch no. 1, was first opened on December 29, 1976. At that time, it was discovered for the first time that part of the bulk sugar had become wet as a result of leakage of sea water into the hatch. Petitioner con-cedes that this leakage stemmed from its

improper maintenance of the hatch covers. Due to the moistened condition of the sugar which, in turn, resulted in part of it becoming frozen in the seasonal temperatures, the Amstar longshoremen (including McCarthy) were paid "distress rates", or double the normal hourly rate, for discharging this "noxious" or "distressing" cargo.

During the discharging, McCarthy worked as a "trimmer" or "cleaner" with responsibility for removing all sugar from the ribs during the third step of each discharge cycle. Specifically, McCarthy was assigned to work the after offshore area of the hatch.

During the first cycle, when the sugar surface was six to ten feet below the underside of the hatch coaming, McCarthy used a short scraper with a six foot handle and a long scraper with a ten to twelve foot handle to remove the

sugar. The short scraper was used to dislodge sugar from about three feet over his head and the longer scraper was used to dislodge sugar between the overhead beams. During the second cycle, the highest sugar in the ribs was four to five feet over his head. Accordingly, McCarthy used the longer scraper to dislodge the sugar so as not to be under it when it fell. Apart from the short and long handled scrapers, no other hand or power tools were used by the longshoremen to dislodge the hardened sugar.

McCarthy's accident occurred as a he was preparing to trim at the end of the third cycle. At that time the surface of the sugar had been lowered to a depth of thirty to thirty-five feet below the underside of the hatch coaming. As he was about to commence scraping the sugar lodged in the after offshore area to which he had been assigned, McCarthy was hit on the head by a large piece of

caked sugar that fell from an area which had been accessible to him during the first or second cycle but which he had not removed.

The case was submitted to the jury on Special Interrogatories after the District Court ruled that the presence or absence of negligent conduct on the part of Amstar was not relevant to Silver Bulk's liability to McCarthy, and that evidence of Amstar's duty of care, including applicable OSHA Safety and Health Standards for Longshoring, 29 CFR §1918, was inadmissable. Based on the jury's answers to the Special Interrogatories, judgment was entered for McCarthy in the amount of $111,318.50. Silver Bulk's post trial motions were denied by the District Court and the Court of Appeals for the Third Circuit affirmed without opinion.

It must be presumed that the Third Circuit, in affirming, relied on

its definition of a vessel owner's duty of care to a longshoreman previously adopted in Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979), cert. pending, 444 U.S. 1042 (1980). Petitioners request this Court to review the correctness of that standard and its application to the facts here.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE SUPREME COURT SHOULD GRANT CERTIORARI IN THIS CASE TO RESOLVE THE PRESENT CONFLICT IN THE CIRCUITS AS TO WHAT IS A VESSEL OWNER'S DUTY OF CARE TOWARD A LONGSHOREMAN UNDER THE 1972 AMENDMENTS TO THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

A central issue in any longshoreman's personal injury action against a vessel owner is whether the vessel owner breached the duty of care imposed by the 1972 Amendments to the Longshoremen's

& Harbor Workers' Compensation Act. At present it is impossible to address that issue with confidence since the Circuit Courts of Appeal are in clear conflict as to the definition of that duty. It is expected that this conflict will be resolved with this Court's decision in De Los Santos v. Scindia Steam Navigation Co., 598 F.2d 480 (9th Cir. 1979), cert. granted, 100 S. Ct. 2150 (1980) (No. 79-512). Since the opinion of this Court in De Los Santos should address the propriety of the standard of care fashioned by the United States Court of Appeals for the Third Circuit and followed in the instant case, certiorari should be granted.

It must be assumed that the Third Circuit judged the conduct of Silver Bulk against the same standard of care it had adopted previously in Sarauw v. Oceanic Navigation Corp., 622 F.2d

1168 (3d Cir. 1980), petition for cert. filed, 49 U.S.L.W. 3135 (U.S. Aug. 18, 1980), and Griffith v. Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3374 (U.S. Nov. 23, 1979) (No. 79-813). In those opinions, the Third Circuit imposed on vessel owners the duty to exercise "reasonable care under the circumstances of each case", which it further elaborated as "at a minimum" permitting a finding of negligence on the part of the shipowner upon a showing:

> (1) That the vessel knew of or by the exercise of reasonable care could have discovered the condition onboard ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working onboard ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger.

Griffith v. Wheeling-Pittsburgh Steel Corp., supra, 610 F.2d at 126.

This same formulation of the vessel owner's duty has been adopted by the Courts of Appeals for the First, Seventh and Ninth Circuits. Johnson v. A/S Ivarans Rederi, 613 F.2d 334 (1st, Cir. 1980), petition for cert. filed, 48 U.S.L.W. 3679 (U.S. April 10, 1980) (No. 79-1587); Matthews v. Ernst Russ Steamship Co., 603 F.2d 676 (7th Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3274 (U.S. Oct. 15, 1979) (No. 79-624); Santos v. Scindia Steam Navigation Co., supra.

The standard adopted by these four Circuit Courts is in direct conflict with that of the Second, Fourth, and Fifth Circuits, which have adopted Restatement (Second) of Torts, §343A as the appropriate standard. See e.g., Evans v. Transportacion Maritime Mexicana SS "CAMPECHE", No. 80-7081, slip op. (2d Cir. Jan. 5, 1981); Chavis v. Finnlines,

Ltd., O/Y, 576 F.2d 1072 (4th Cir. 1978); Stockstill v. Gypsum Transportation, 607 F.2d 1112 (5th Cir. 1979), rehearing denied, 610 F.2d 818 (1980), petition for cert. filed 48 U.S.L.W. 3538 (U.S. Feb. 8, 1980) (No. 79-1240).

This conflict between the Circuits is patently at odds with the express intent of Congress in enacting the 1972 Amendments. The Committee Report accompanying the Amendments is clear:

> [T]he Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law. H.R. Rep. No. 92-1441, 92d. Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad News 4698, 4705.

Since this conflict among the Circuits has not been resolved, and will not be until this Court renders its decision in

De Los Santos, review by this Court of the judgment of the Court of Appeals for the Third Circuit should be granted.

II. THE JUDGMENT OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT WAS BASED ON AN ERRONEOUS STANDARD OF CARE FOR A VESSEL OWNER TOWARD A LONGSHOREMAN AND WAS INCONSISTENT WITH THE PROPER LAND-BASED PRINCIPLES OF TORT LIABILITY.

The District Court judgment affirmed by the Third Circuit was entered in the face of uncontroverted evidence that Amstar, the stevedore, was aware of the condition causing the accident several days before it occurred. Further, Amstar had exclusive control over that condition and the sole ability to correct the condition. Thus, the Third Circuit's standard fails to take into account the stevedore's superior expertise in discharging cargo and its control over the work area during the discharging operations. Likewise, that standard is inconsistent with the intent of Congress

to have land-based negligence principles applied to longshoremen's actions so that longshoremen will be no better off than their shoreside counterparts. Accordingly, this Court should grant certiorari to expressly disapprove the Third Circuit standard both generally and as it was applied in this case.

The land-based principles of tort law with greatest relevance to such actions are those set forth in the Restatement (Second) of Torts, §§343, 343A, 409-414. Nowhere do these sections suggest that a possessor of land has a duty to supervise the work of an independent contractor retained to work on the land on pain of liability to such contractor's employees for injuries resulting from the contractor's failure to respond effectively to dangers of which it was aware and which it was in a position to correct. Indeed, §343 renders a possessor of land

liable for harm to invitees only where the possessor of land "should expect that [the invitees] will not discover or realize the danger, or will fail to protect themselves against it."[1] To similar effect is §343A, which deals with dangers known or obvious to the invitee. That provision places an even higher burden

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[1]The full text of Section 343 of the Restatement is as follows:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it,
>
> (c) fails to exercise reasonable care to protect them against the danger.

on the invitee to establish negligence on the part of the possessor of land. It states that the possessor of land will not be liable for harm caused by a known or obvious danger "unless the possessor should anticipate the harm despite such knowledge or obviousness."[2]

With respect to injuries which are caused by an act or omission of an

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[2]The full text of Section 343A is as follows:

> (1) a possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.
>
> (2) In determining whether the possessor should anticipate harm from a known or obvious danger, the fact that the invitee is entitled to make use of public land, or of the facilities of a public utility, is a factor of importance indicating that the harm should be anticipated.

independent contractor, the liability of the employer (vessel owner) of such contractor (stevedore) is also carefully circumscribed. The Restatement permits a finding of vessel owner liability for such injury only where the stevedore is acting on orders negligently given by the vessel owner [§410], where the vessel owner negligently selects the stevedore [§411], or where the vessel owner retains control over the stevedore's activities and fails to act with reasonable care in exercising that control [§414].[3]

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[3]The full text of these provisions, including the General Principle stated in Section 409, are as follows:

> §409 General Principle
>
> Except as stated in §§410-429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.
>
> §410. Contractor's Conduct in Obedience to Employer's Directions

(footnote continued next page)

(footnote 3 continued)

> The employer of an independent contractor is subject to the same liability for physical harm caused by an act or omission committed by the contractor pursuant to orders or directions negligently given by the employer, as though the act or omission were that of the employer himself.
>
> §411. Negligence in Selection of Contractor.
>
> An employer is the subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor
> (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
> (b) to perform any duty which the employer owes to third person.
>
> §414. Negligence in exercising Control Retained by Employer.
>
> One who entrusts work to an independent contractor, but who attains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes the duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

The conflict between these Restatement sections and the standard adopted by the Third Circuit comes clearly into focus when applied to the facts of the instant case. The Third Circuit sanctioned a finding of Silver Bulk's liability for McCarthy's injuries notwithstanding (1) the condition of frozen sugar in the hatch which caused McCarthy's injuries was one commonly experienced by Amstar and was not dangerous or even known until after Amstar began discharging the cargo; (2) Amstar had exclusive control over the method used to discharge the sugar and the stevedoring contract precluded vessel personnel from interfering with the stevedore operation and from removing the frozen sugar; (3) Silver Bulk was not requested to aid in correcting the condition when it became known to Amstar; (4) Silver Bulk was not aware of said

condition prior to the accident; and (5) Amstar's longshoremen were paid twice the normal hourly rates to discharge the cargo specifically because of its moistened condition. Under these circumstances, the Restatement (Second) of Torts provisions, as applied by the Courts of Appeals for other Circuits, mandate that judgment should have been entered in favor of Silver Bulk as a matter of law. See Mattivi v. South African Marine Corp., 618 F.2d 163 (2d Cir. 1980); Giglio v. Farrell Lines, Inc., 613 F.2d 429 (2d Cir. 1980) [lead opinion by Judge Meskill]; Cox v. Flota Mercante Grancolombiana, S.A., 577 F.2d 798 (2d Cir. 1978), cert. denied, 439 U.S. 881 (1978); Briley v. Charente Steamship Company, 572 F.2d 498 (5th Cir. 1978); Hess v. Upper Mississippi Towing Co., 559 F.2d 1030 (5th Cir. 1977), cert. denied, 435 U.S. 924 (1978); Anuszewski v. Dynamic Mariners Corp. Panama , 540

F.2d 757 (4th Cir. 1976), cert. denied, 429 U.S. 1098 (1979).

III. IN AFFIRMINING THE JUDGMENT OF THE DISTRICT COURT, THE COURT OF APPEALS FOR THE THIRD CIRCUIT INCORRECTLY HELD THAT THE NEGLIGENCE OF A STEVEDORE IS IRRELEVANT IN A LONGSHOREMEN'S SUIT AGAINST A SHIPOWNER UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND IN BARRING EVIDENCE THAT STEVEDORING PRACTICES WHICH LED TO THE LONGSHOREMAN'S INJURIES VIOLATED THE OSHA REGULATIONS FOR LONGSHORING.

At the trial of this case the District Court ruled that Amstar's negligence was irrelevant to McCarthy's cause of action against Silver Bulk, and removed the issued from the jury's consideration. In so doing, the District Court barred evidence of Amstar's violation of the OSHA Regulations for Longshoring.[4] The affirmance of this ruling

[4]The particular Regulation which the shipowner attempted to introduce in this case deals specifically with the stevedore's obligation to eliminate the danger (footnote 4 continued next page)

by the Third Circuit is in conflict with the express wording of 33 U.S.C. §905(b) and the rulings of other Circuit Courts. Further, it places an untolerable and unfair burden on vessel owners to establish that their negligence is not a proximate cause of injuries suffered by longshoremen.

In pertinent part, 33 U.S.C. §905(b) provides that a vessel owner is not liable to a longshoremen "if the

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(footnote 4 continued)

presented by cargo which may fall upon the longshoremen. The text of that Regulation is as follows:

> §1918.83 Stowed cargo, tiering and breaking down. (Emphasis in the original).
>
> (a) When necessary, cargo shall be secured or blocked to prevent its shifting or falling.
>
> (b) In breaking down, precautions shall be taken, when necessary, to prevent the remaining cargo from falling.
>
> (c) ....

injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." It necessarily follows that if the vessel owner can show that the stevedore's negligence, rather than its own, was the cause of the longshoreman's injuries, the vessel owner must be exonerated.

The issue of stevedore negligence also plays a critical part in the jury's consideration of vessel owner liability pursuant to the relevant sections of the Restatement (Second) of Torts. Under §§343 and 343A a vessel owner is only responsible for a dangerous condition where it is reasonable for it to believe the stevedore will not correct it before injury results. In the majority of circumstances it will be reasonable (not negligent) for the vessel owner to assume that the stevedore will perform its responsibilities in a non-negligent

manner. See Clemons v. Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979), petition for cert. filed, 48 U.S.L.W. 3323 (U.S. Nov. 1, 1979) (No. 79-706). Thus, a showing that the stevedore was negligent and that such negligence led to the longshoreman's injuries would be the basis of a valid defense even where the condition may have been caused by the vessel's antecedent negligence. Moreover, in order for a vessel owner to establish a stevedore's negligence, the vessel owner must be permitted to show the standard of care which the law imposes on the stevedore. Accordingly, it is error to preclude the vessel owner from establishing that standard through the pertinent OHSA Regulations.

In order to assure that vessel owners are given the same opportunity to present evidence of a stevedore's negligence as the opportunity given long-

shoremen to establish negligence on the part of the vessel owner, this Court should grant review and reverse the judgment of the Court of Appeals for the Third Circuit.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the Third Circuit Court of Appeals.

Respectfully submitted,

Robert Blair White, Jr.
Attorneys for Petitioners

[APPENDIX A]

[App. 1A]

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 80-1641

WILLIAM McCARTHY

v.

SILVER LINE, LTD. and SILVER BULK SHIPPING, LTD.

Silver Bulk Shipping, Ltd., Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
C. A. No. 78-1484

Argued December 5, 1980

Before: ADAMS, GARTH and SLOVITER, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Each side to bear its own costs.

BY THE COURT,

Circuit Judge

ATTEST:

Chief Deputy Clerk

DATED: December 12, 1980

Certified as a true copy and issued in lieu of a formal mandate on January 5, 1981.

Test: SALLY MEYOS

Clerk, United States Court of Appeals for the Third Circuit

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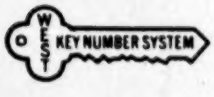
title to the $100,000.00 remained with plaintiff. The Court agrees with this allegation and since a trustee must have legal title to the res, *Potter v. Winter*, 280 S.W.2d 27, 33 (Mo.1955), defendant was not trustee of the security deposit.

[8] Article XXIV of the lease provides that "the prevailing party shall be entitled to attorney's fees and costs." Both parties have asked for their respective attorney's fees and costs. Plaintiff has been successful in recovering a portion of his security deposit. Defendant has been successful in its counterclaim and in certain setoffs against the security deposit. In view of the fact that both parties were partially successful and neither party totally successful, the Court finds that neither party was "prevailing" as contemplated in Article XXIV. Under these circumstances, neither party will be awarded attorney's fees or costs. See *Boenzle v. U. S. Fidelity & Guaranty Co.*, 258 S.W.2d 938, 943 (Mo.App.1953), *Ehrlich v. Lichtenfeld*, 502 S.W.2d 420, 424 (Mo.App.1973).

Accordingly, it is ordered that defendant return to the plaintiff the security deposit plus sixty-six percent of the accumulated interest thereon, less setoffs of $34,051.55, and attorney's fees of $2,500.00 under the counterclaim, and each party will bear its own costs and attorney's fees.

This memorandum opinion is adopted by the Court as its findings of fact and conclusions of law and the clerk of the Court will prepare and enter the proper order to that effect.



William McCARTHY

v.

SILVER BULK SHIPPING LTD.

Civ. A. No. 78-1484.

United States District Court,
E. D. Pennsylvania.

March 19, 1980.

Longshoreman brought action to recover damages from vessel owner. Following jury's verdict in favor of the longshoreman, the vessel owner filed motion for new trial or judgment notwithstanding the verdict. The District Court, Joseph S. Lord, III, Chief Judge, held that: (1) evidence was sufficient to show the vessel owner negligent; (2) any negligence of stevedore was not a superseding cause; (3) evidence was sufficient to show that vessel owner's negligence caused the injuries suffered by the longshoreman; and (4) jury's findings as to loss of earnings were not against the clear weight of the evidence.

Motions denied.

1. Workers' Compensation ⇐2085

Under the Longshoremen's and Harbor Workers' Compensation Act, as amended, longshoreman can bring suit only as to vessel owner and only for the owner's negligence. Longshoremen's and Harbor Workers' Compensation Act, §§ 1–51 as amended 33 U.S.C.A. §§ 901–950.

2. Shipping ⇐85

Although owner and employer are not concurrently or jointly responsible for the safety of longshoremen, they can be concurrently liable for injuries they have proximately caused; vessel owner can be found liable for its negligence notwithstanding the negligence of the stevedore. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

[App. 3a]

3. Federal Civil Procedure ⇐2121, 2605, 2608

Standard for a motion for judgment notwithstanding the verdict is whether the plaintiff has adduced sufficient evidence to create an issue of fact for the jury; court does not weigh the evidence or pass on the credibility of witnesses; standard for deciding directed verdict and judgment notwithstanding the verdict motions is the same. Fed.Rules Civ.Proc. Rule 50, 28 U.S.C.A.

4. Shipping ⇐84(3¼)

Vessel owes longshoremen a duty of care for reasonable maintenance of the ship. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

5. Shipping ⇐84(3¼)

Where owner contracted with stevedore to unload the cargo and knew that the longshoremen would be working in the hold, so there was no possibility that the condition in the hold which resulted from improperly maintained hatch cover would go unacted on by others, it was reasonably foreseeable to the vessel owner that water leakage into the hold, alone or in combination with winter weather conditions, could cause the sugar in the hold to freeze, thereby creating a hazardous working condition for the longshoremen. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

6. Shipping ⇐86(2¼)

Evidence that longshoreman used standard equipment for unloading cargo of sugar, that use of other equipment was not practical given the circumstances, that seawater leaked in through rusted hatch covers, and that the seawater along with winter weather conditions caused the sugar to freeze sustained jury's determination that vessel owner breached its duty to the longshoreman, who was struck on the head by a 400-pound piece of frozen sugar. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

7. Shipping ⇐86(3)

In view of jury's finding that vessel owner's negligent acts were responsible for the injury notwithstanding the acts of the stevedore, the stevedore's negligence, if any, was at least irrelevant to the injury and could not constitute a superseding cause of the injury.

8. Shipping ⇐86(2¼)

Evidence of methods used by stevedores to unload sugar cargoes and the methods used in the particular case was sufficient to permit jury to find that any negligence on the part of the stevedore was not a superseding cause of the injury. The negligence of the vessel owner in maintaining the hatch covers in such a way that seawater could enter the hold and cause the sugar to freeze was the proximate cause of the injury.

9. Shipping ⇐84(5)

Neither assumption of risk nor contributory negligence is a defense to a longshoreman's claim against a vessel owner. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A § 905(b).

10. Shipping ⇐86(2¼)

Evidence of the presence of seawater in the cargo of sugar, evidence that the seawater came in through rusty hatch covers, evidence of the weather conditions at the port where the ship was berthed for unloading, and evidence of the discoloration of the frozen sugar when the moisture is seawater was sufficient to permit a jury to infer that wetness was due to leakage, as opposed to the moisture content of the sugar itself, thus sustaining jury's finding that vessel owner was negligent with respect to injuries suffered by longshoreman who was struck by a 400-pound piece of frozen sugar while helping to unload the cargo. Longshoremen's and Harbor Workers' Compensation Act, § 5(b) as amended 33 U.S.C.A. § 905(b).

11. Federal Civil Procedure ⇐2152

Case properly goes to the jury even if no facts are in dispute if there are conflicting inferences which may be drawn from them.

12. Federal Civil Procedure ⇐2603

Contention that jury's answers to interrogatories are against the clear weight of the evidence should be directed to a motion for new trial and not toward a motion for judgment notwithstanding the verdict.

13. Shipping ⇐86(2½)

Because, in order to answer interrogatory as to whether vessel owner's duty had shifted to a third party, jury did not need to consider evidence of stevedore's negligence as even the conceded negligence of the stevedore would not necessarily bar the longshoreman's recovery from the owner, it was proper to keep out evidence of the stevedore's negligence while still submitting to the jury the question of whether the duty of the vessel owner had shifted to the stevedore.

14. Damages ⇐172(1)

It is proper to prove damages by introducing evidence of plaintiff's earnings at the time of the injury and of his life and work expectancy.

15. Damages ⇐172(1)

Vessel owner, against whom longshoreman brought action, was not entitled to cross-examine on social security retirement pension and the longshoreman's union pension as such question would be prejudicial to the longshoreman as tending to lead the jury to believe that the longshoreman had not intended to continue working even though a decision to cease working may have been the result of the injury.

16. Shipping ⇐86(2½)

Although vessel owner cannot assert contributory negligence of the stevedore to reduce the plaintiff longshoreman's recovery, evidence of the contributory negligence of the longshoreman can be considered in mitigation of damages.

17. Shipping ⇐86(2¼)

Evidence was insufficient to permit jury to conclude that use by longshoreman of alternative tools for unloading sugar cargo was feasible so as to render the longshoreman contributorily negligent because of the manner in which he was attempting to unload the cargo.

Charles Sovel, Freedman & Lorry, Philadelphia, Pa., for plaintiff.

Robert B. White, Jr., Rawle & Henderson, Philadelphia, Pa., for defendant.

OPINION

JOSEPH S. LORD, III, Chief Judge.

Plaintiff, William McCarthy, a longshoreman, brought this action to recover damages from defendant vessel owner, Silver Bulk Shipping, Ltd., for personal injuries sustained allegedly as the result of defendant's negligence. The action was brought pursuant to the Longshoreman's and Harbor Workers' Compensation Act, § 5(b) as amended, 33 U.S.C. § 905(b), with jurisdiction based on diversity of citizenship, 28 U.S.C. § 1332.

On January 6, 1977, plaintiff, employed as a longshoreman by Amstar Corporation, was performing his duties in the No. 1 hold discharging a cargo of raw sugar from the M/V Silvertweed, a vessel owned and operated by defendant, when he was struck on the head by a 400 lb. hulk of frozen sugar. After a four-day trial (June 5 through June 8, 1979) a jury found defendant's negligence had proximately caused plaintiff's injuries and awarded plaintiff $111,318.50 in damages. Defendant has filed post-trial motions pursuant to Rule 50 of the Federal Rules of Civil Procedure for judgment notwithstanding the verdict, or in the alternative for a new trial.

[1] In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act of 1927 (LHWCA), 33 U.S.C. §§ 901–50, fundamentally altering the relationships among vessel owners, stevedores (employers) and longshoremen.[1] Pursuant

1. For background history and analysis of the changes, *see Griffith v. Wheeling-Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed.2d 643 (1976) (*"Griffith I"*); *Hurst v. Triad Shipping Co.*, 554 F.2d 1237 (3d Cir.) *cert. denied*,

to the changes, a vessel owner would no longer be strictly liable for a longshoreman's injuries on the basis of unseaworthiness or nondelegable duty, or for a stevedore's negligence on a *respondeat superior* theory. Concomitantly, an owner no longer would have a cause of action against a stevedore for indemnification. Instead, an owner would be liable to an injured longshoreman only for its own negligence that proximately caused the injury. *Rich v. U.S. Lines*, 596 F.2d 541, 545 (3d Cir. 1979). In addition, an employer's (stevedore's) only liability would be under a workers' compensation claim. For the restrictions on his actions against owners and stevedores, the longshoreman received increased compensation benefits and coverage under the Act. In short, under the Act as amended, a longshoreman can bring suit only against a vessel owner and only for the owner's negligence. Although Congress did not define the standard of care by which to measure a vessel owner's liability, the House Report on the amendment made clear that vessels owe some duty of care to longshoremen:

> Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition.

H.R.Rep.No.1441, 92 Cong., 2d Sess., *reprinted in* [1972] U.S.Code Cong. & Admin. News, pp. 4698, 4704 [hereinafter "House Report"].

In a number of post-amendment cases, the Third Circuit has begun to define the extent of an owner's liability.[2] In accordance with the Congressional purpose to have a uniform federal law applied to § 905(b) cases[3], the Third Circuit has ruled that the court should look to the Restatement (Second) of Torts for guidance, but only when the sections in question "are clearly consistent with the purposes and policies of the Act." *Rich, supra*, 596 F.2d at 547; *Hurst, supra*, 554 F.2d at 1249 n.35.[4]

[2] Central to Congressional policy and purpose is the recognition that the Act places primary responsible for safe working conditions on the stevedore. *Brown, supra*, 545 F.2d at 860; *Rich, supra*, 596 F.2d at 548. Although the Third Circuit reversed and remanded in *Marant* on this basis, *supra*, 550 F.2d at 144, the Court of Appeals has consistently recognized that although owner and employer are not concurrently or jointly responsible for the safety of long-

434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977).

2. *Griffith I, supra; Brown v. Ivarans Rederi A/S*, 545 F.2d 854 (3d Cir. 1976), *cert. denied*, 430 U.S. 969, 97 S.Ct. 1652, 52 L.Ed.2d 361 (1977); *Marant v. Farrell Lines, Inc.*, 550 F.2d 142 (3d Cir. 1977); *Hurst, supra; Rich, supra; Griffith v. Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116 (3d Cir. 1979) ("Griffith II").

3. *See* House Report at 4705: "[T]he Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the State in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions of the law shall be determined as a matter of Federal law." *See also Brown, supra*, 545 F.2d at 862-63.

4. The court in *Brown* held that sections 281-83, 302A, 305, 452, of the Restatement (Second) of Torts apply to § 905(b) cases. In addition, given the clearly stated intention of Congress that the doctrines of contributory negligence as a complete bar and assumption of the risk are not to apply in cases decided under § 905(b), House Report at 4705, the Third Circuit has held that §§ 343 and 343A of the Restatement are not applicable. *Griffith II, supra*, 610 F.2d at 125; *Hurst, supra*, 554 F.2d at 1249 n.35. In *Hurst* the Court of Appeals recognized a stevedore as an independent contractor and held that Restatement § 409 (employer generally not liable for acts of an independent contractor; subsequent sections note the exceptions) applies to § 905(b) cases with a § 414 exception (where the owner retains a degree of control over work of the independent contractor such that liability may be imposed on the owner). The court held that the exceptions stated in §§ 416 through 429 of the Restatement rest on theories of vicarious liability and therefore are not applicable to a § 905(b) case.

shoremen, they can be concurrently liable for injuries they have proximately caused. That is, a vessel owner can be found liable for its negligence notwithstanding the negligence of the stevedore. *Griffith II, supra*, 610 F.2d at 124–25. Indeed, as the Supreme Court has observed in its most recent opinion on the 1972 amendments, "a longshoreman who is injured by the concurrent negligence of the stevedore and the ship may recover for the entire amount of his injuries from the ship." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266, 99 S.Ct. 2753, 2760, 61 L.Ed.2d 521 (1979).

In its most recent opinion in a § 905(b) case, the Third Circuit has held that "[the section] imposes on vessel owners the same duty to exercise 'reasonable care under the circumstances of each case' that would be applicable to a land based business." *Griffith II, supra*, 610 F.2d at 125. Thus it held that a vessel could be found negligent on a showing:

> (1) that the vessel knew of or by the exercise of reasonable care could have discovered the condition on board ship that led to the injury; (2) that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship; and (3) that the vessel failed to exercise reasonable care to protect the longshoremen against that danger.

Id. at 126. This standard must be analyzed in the context of defendant's post-trial motions.[5]

A. Motion for Judgment Notwithstanding the Verdict

[3] The standard for a motion for judgment notwithstanding the verdict[6] is whether plaintiff has adduced sufficient evidence to create an issue of fact for the jury. The court does not weigh the evidence or pass on the credibility of witnesses. In application, the motion is granted sparingly, since it deprives a party of a jury's determination of the facts. *Jeanes v. Milner*, 428 F.2d 598, 601 (8th Cir. 1970).

Defendant bases its motion for judgment notwithstanding the verdict on four general points:

1. That the evidence offered was not sufficient to establish a cause of action under the applicable law;

2. That defendant was relieved of liability under § 452(2) of the Restatement (Second) of Torts;

3. That the evidence was not sufficient to show that defendant's negligence caused plaintiff's injuries;

4. That the jury's findings as to loss of earnings "are against the clear weight of the evidence." Shipowners' Brief in Support of its Post-trial motions at 12.

1. *Cause of Action under § 905(b)*

Plaintiff's case in brief is that defendant negligently maintained the hatch covers of the vessel so that sea water leaked into Hold No. 1 and in combination with freezing temperatures caused some of the sugar to freeze, thereby creating the dangerous condition that caused plaintiff's injuries.[7] There was undisputed evidence that the cargo of sugar in Nos. 1 and 6 holds was "damaged by reason of wetting," that chemical tests showed a saline reaction (presence of seawater), that the source of the entry into No. 1 hold was through the

5. In accordance with Rule 50 of the Federal Rules of Civil Procedure, defendant properly moved for a directed verdict at the close of plaintiff's case and when denied, again at the close of all of the evidence. The motion for judgment notwithstanding the verdict or in the alternative for a new trial was timely filed.

6. The standard for deciding directed verdict and judgment notwithstanding the verdict motions is the same. *Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205, 1210 n.5 (3d Cir.), *cert. denied*, 400 U.S. 826, 91 S.Ct. 51, 27 L.Ed.2d 55 (1970); *Wright & Miller*, Federal Practice & Procedure, Civil § 2524 at 542.

7. Under this theory it is irrelevant that defendant did not know that the sugar was frozen until the hatch was opened. *Compare Valle v. Jugoslavenska Linejska Plovidba*, 434 F.Supp. 608, 611 (S.D.N.Y.1977) ("shipowner does not have a duty to discover and correct hidden defects in the cargo after his ship has been loaded by competent stevedores.")

hatch cover, that heavy rust on the raised lips of the hatch coamings prevented the cover from providing a water tight seal. *American Marine Services, Inc. Survey Report*, Transcript (T) 1–18 through 22. In addition there was undisputed testimony that it would take years to build up the pattern of rust on the coaming lip, T 1–47, and that the vessel's crew was responsible for maintaining the hatch closing system. T 1–48.

That defendant was negligent in failing to maintain the hatch covers in a reasonably safe condition was not disputed at trial, and I so charged the jury. T 3–58 through 59; see also T 2–55 through 56 (during argument on defendant's motion for directed verdict, defendant conceded negligence with regard to the hatch covers); Shipowner's Brief at 2.

[4] That a vessel owes a duty of care for reasonable maintenance of the ship is equally clear. The Third Circuit in *Hurst* held that the vessel's "responsibility relates to the condition of the ship itself, not the activities of the stevedore." *Supra*, 554 F.2d at 1250 n.35. In *Rich* the court held that plaintiff is required to show that the vessel owner normally assumes responsibility for the maintenance and care of the items in question. *Supra*, 596 F.2d at 553.[8]

By asserting that plaintiff failed to produce sufficient evidence to establish a cause of action under the applicable law, defendant in effect is claiming that no duty of care was owed. In support of this proposition defendant claims, as did the vessel owner in *Griffith II*, that plaintiff has failed to adduce sufficient evidence as to the second prong of the *Griffith II* test:[9]

> . . . . .
>
> (2) That the vessel knew or should have known that the condition would pose an unreasonable risk of harm to longshoremen working on board ship.

Inasmuch as defendant knew or should have known of the rusty condition of the hatch covers and failed to correct it, defendant is held to knowledge that seawater could, as it did, enter the holds thus damaging the cargo. Defendant argues that under Restatement (Second) § 302, the condition created was harmless if left to itself. Thus, the defendant would only be negligent if it reasonably could recognize the subsequent actions of the stevedores as probable. Restatement (Second) § 302 Comment *d. Probability of Intervening Action.*

[5] It is disingenuous of defendant to argue that "the improperly maintained hatch cover and the bulk sugar in the hatch at the time the vessel arrived in Philadelphia, were harmless of themselves," Shipowner's Brief at 3, and that it could not foresee the stevedore's subsequent acts as "probable," Restatement (Second) § 302 Comment *d.*[10] The owner contracted with the stevedore to unload the cargo, thus obviously aware that longshoremen would be working in the hold. That is, there is no possibility that the condition in the hold resulting from the improperly maintained hatch covers would go unacted upon by others. Thus it was reasonably foreseeable

8. As distinct from the instant case, in *Rich*, "the vessel owner's sole involvement in the events leading up to Rich's injury amounted to taking no action to remedy a condition of the cargo not customarily his responsibility." *Supra*, 596 F.2d at 555.

9. In *Griffith II* the Court of Appeals concluded, "Certainly, there was ample evidence to support the court's conclusion that American knew or should have known of the rusted, decrepit condition of the covers on barge 2730, and that American failed to exercise reasonable care to correct that condition." *Supra*, 610 F.2d at 126. Defendant also argues that under the standard of care established in Restatement (Second) of Torts §§ 343 and 343A, the condition of the sugar was "known and obvious" and defendant is thereby relieved of liability. As noted *supra*, note 4, the Third Circuit has rejected the application of these sections to § 905(b) cases on the grounds that they are inconsistent with Congressional policy to abolish doctrines of contributory negligence as a complete bar, assumption of the risk, and nondelegable duty in § 905(b) cases.

10. It should be noted that § 302 only involves the foreseeability of the subsequent acts, not whether they were negligent. *Compare* § 302A.

that water leakage into the hold alone or in combination with winter weather conditions could cause the sugar to freeze, thereby creating a hazardous working condition for the longshoremen.

[6] In addition, in this case there was evidence that plaintiff used standard equipment for unloading a cargo of sugar, T 1–85, that use of other equipment was not practical given the circumstances, T 1–85, 2–28 through 30, that the three-part cycle method of discharge was common in the industry, T 1–27 through 32, 1–124, 2–83 through 84. This evidence was more than sufficient to create an issue for jury consideration. The only evidence to the contrary was offered by defendant's expert Mr. Keeler who testified that when he supervised stevedoring operations a different method was used; Mr. Keeler further testified that the methods with which he was familiar were out-of-date. T 2–83.

This is not a case where the vessel owner turned over a ship in a reasonably safe condition to a stevedore, and a longshoreman is attempting to impose liability on the owner.[11] As the Court of Appeals noted in *Rich*, it had remanded the cases in *Brown* and *Marant* in light of evidence "suggesting the vessel owner was directly involved with creating the condition which resulted in the longshoreman's injury," *supra*, 596 F.2d at 555. The court in *Rich* further explained that in view of the purpose of the Act to encourage safety on the waterfront, "in order to impose liability on the vessel owner under Section 905(b), we must be sure that it and not the stevedore is in the position best able to prevent similar accidents from arising in the future." *Supra*, 596 F.2d at 554. In light of the conceded negligence of the defendant, the testimony as to use of unexceptionable methods of discharging a cargo, and the policy underlying the Act, I conclude there was sufficient evidence for plaintiff to have prevailed under the standard enunciated in *Griffith II*.

2. *Superseding Cause*

Defendant argues that as a matter of law it should be relieved of liability under § 452(2) of the Restatement (Second) of Torts.[12] Section 452 in its entirety provides:

> (1) Except as stated in Subsection (2), the failure of a third person to act to prevent harm to another threatened by the actor's negligent conduct is not a superseding cause of such harm.
>
> (2) Where, because of lapse of time or otherwise, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause.

Section 452 itself gives little assistance in defining the standards for measuring when responsibility has shifted to a third person, thereby relieving the original actor of liability for negligence. Comment *d.* does state that subsection (2) covers the "exceptional" cases.[13] Comment e., however, notes that in

11. *Compare Hurst, supra*, 554 F.2d at 1249 n.35.

12. Contrary to plaintiff's assertion, the Third Circuit has expressly held that § 452(2) is applicable to § 905(b) cases. *Brown, supra*, 545 F.2d at 863; Plaintiff's Brief in opposition to defendant's post-trial motions at 16.

13. This statement comports with Third Circuit holdings in § 402A products liability cases that the intervening act must be

> so extraordinary as not to have been reasonably foreseeable, and . . . whether the act was reasonably foreseeable [is] to be determined by following retrospectively the sequence of events and looking back from the harm to the negligent act rather than by considering whether the defendant should prospectively have envisaged the events which unfolded and caused the accident.

Wilson v. American Chain and Cable Co., 364 F.2d 558, 562 (3d Cir. 1966). The *Wilson* formulation was applied by then District Judge Higginbotham in a non-products liability suit. *Hennigan v. Atlantic Refining Co.*, 282 F.Supp. 667 (E.D.Pa.1967), *aff'd*, 400 F.2d 857 (3d Cir. 1968), *cert. denied, City of Philadelphia v. Atlantic Refining Co.*, 395 U.S. 904, 89 S.Ct. 1739, 23 L.Ed.2d 216 (1969). In its most recent decision involving a superseding cause claim in a non-products liability case, the Third Circuit cited Pennsylvania law that incorporates a re-

many cases the duties and obligations are such that they cannot be shifted.

Defendant advances a number of reasons why the duty to prevent harm had shifted to the stevedore. Shipowner's Brief at 6–7.[14] Essentially defendant raises three issues: primary responsibility for work place safety rests on the stevedore[15]; the stevedore's method of discharging the cargo was negligent[16]; because the stevedore and plaintiff knew of the condition of the cargo, they assumed the risk and/or were contributorily negligent.[17]

That the major responsibility for the proper and safe conduct of the work rests on the stevedore is not disputed. *Brown, supra*, 545 F.2d at 860; *Marant, supra*, 550 F.2d at 144; *Rich, supra*, 596 F.2d at 548. The imposition of a duty on stevedores does not, however, relieve owners of their duty to exercise reasonable care with regard to the condition of the ship. As the Supreme Court made clear in *Edmonds*, the 1972 amendments provide for the concurrent negligence of stevedore and vessel owner. In this light, no Third Circuit case has held that the sole responsibility for safety rests on the stevedore.

With regard to the stevedore's negligence, the fact that "the stevedore has been negligent cannot be automatically decisive of [the] question [whether the vessel has breached its duty of care]." *Griffith II, supra*, 610 F.2d at 125. As noted at trial in the instant case, proof that the stevedore used improper methods would only show that the stevedore may have been a joint or concurrent tortfeasor. T 2–77.[18] Thus, assuming negligence on the part of a stevedore, a vessel owner can still be liable for its own negligence. Short of showing extraordinary, *i. e.*, unforeseeable, acts by the stevedore, an owner cannot claim relief from liability under § 452(2). The defendant here has not shown any degree of extraordinariness in the stevedore's actions such that as a matter of law I could rule defendant relieved of liability under § 452(2).

Interrogatory No. 2 was presented to the jury as follows:

> Q. If your answer to No. 1 is YES,[19] was this a condition which could have been remedied by a reasonable stevedore?

At the time of trial it was understood by counsel and myself that if the jury answered "Yes" to No. 2, defendant would have been relieved of liability, T 3–39 through 42, on a theory that a vessel owner's duty encompasses knowledge of what a reasonable stevedore would do, and if the stevedore could have remedied the condition, then there would have been no breach of duty. The opinion in *Griffith II*, filed after this trial, appears to reject this analysis. The court reasoned that this approach would relieve a vessel of liability for its own negli-

quirement of extraordinariness. *Bradshaw v. Rawlings*, 612 F.2d 135, 143 (3d Cir. 1979). Most of these suits involved the application of state law concepts of strict liability under diversity jurisdiction. There is no reason, however, not to apply in a federal case the principle that it is only the extraordinary or the unforeseen that can be characterized as a superseding cause, for the absence of a fault requirement in the initial acts has no bearing on the unforeseeability of a third person's acts. Whether based on a fault or no-fault theory, a party had breached a duty and would have been liable save for circumstances that *shifted* the duty.

14. As in *Blackburn v. Prudential Lines, Inc.*, "Defendant merely asserts, without demonstrating why, that this duty shifts at the time the stevedore comes on board from defendant's shoulders to the stevedore's rather than rests on both parties." 454 F.Supp. 1302, 1308 (E.D. Pa.1978).

15. Reasons Nos. (1) and (2). Shipowner's Brief at 6.

16. Reasons Nos. (7), (8), (9), (10), (11). Shipowner's Brief at 6–7.

17. Reasons Nos. (3), (4), (5), (6), (8). Shipowner's Brief at 6–7.

18. *See* discussion of stevedore negligence, *infra*, note 25 and accompanying text.

19. Interrogatory No. 1:

> Did the leakage of seawater into the hold alone or in combination with the freezing temperature bring about a condition which was a substantial factor in causing the accident?

gence whenever a stevedore was negligent, by virtue of imputing "to the non-negligent longshoreman the negligence of his stevedore employer, and establish[ing] that negligence as a complete bar to recovery against the vessel." *Supra*, 610 F.2d at 124–25. Inasmuch as Interrogatory No. 2 offered defendant a possibility for relief from liability that the Third Circuit now tells us would have been improper, the question as posed to the jury is at most harmless error.

[7] The Interrogatory constitutes a finding of fact, however, useful for determining defendant's motion. As I charged the jury, the Interrogatory asked whether a reasonable stevedore could have removed the "huge lump of sugar", T 8–56, that was sticking to the ribs of No. 1 hold in such a way as to have prevented the injury. Had the jury answered "Yes," *Griffith II* tells us that additional questions would have to be asked before a vessel owner would be relieved of liability.[20] By answering "No" as it did, the jury told us that the owner's negligent acts were responsible for the injury notwithstanding the acts of the stevedore. The stevedore's negligence, if any, was therefore at the least irrelevant to the injury; at most it might have enhanced the damage. Thus, on the facts as found by the jury, the acts of the stevedore could not constitute a superseding cause of the injury.[21]

[8] The question in terms of defendant's motion for judgment notwithstanding the verdict is whether the evidence was sufficient for the jury to have answered the way it did. I conclude that in light of the evidence of methods used by stevedores to unload sugar cargoes and the methods used in this particular instance, there was sufficient evidence for the jury to have concluded as it did.

[9] Defendant next argues that the stevedore and longshoremen knew that the sugar was frozen when the hatch was first opened, that they knew the sugar would fall if left caked, that they had completed two discharge cycles before the accident, and that they received "distress wages" for unloading the cargo. In essence, these arguments rest on theories that the stevedore and plaintiff had assumed the risk and/or were contributorily negligent. Neither is a defense to a § 905(b) claim. *See supra*, note 4.

3. *Causation*

Defendant asserts that plaintiff did not introduce sufficient evidence for the jury to have answered Interrogatory No. 1. *See supra*, note 19. Plaintiff's case required the jury to conclude that it was more probable than not that the seawater in the hold in combination with the freezing temperatures caused the sugar to freeze to the ribs of the ship. Defendant, on the other hand, argued to the jury that the moisture content of the sugar itself, in combination with the freezing temperatures, caused the sugar to freeze.

[10, 11] Plaintiff introduced evidence as to the presence of seawater in the sugar, the source of its entry, the weather conditions at the Port of Philadelphia when the ship was berthed there for unloading, the discoloration of the frozen sugar when the moisture is seawater. I conclude that this evidence was sufficient for a jury reasonably to infer that the wetness due to leak-

20. In *Griffith II*, the Court of Appeals stated that it was not holding "that the likelihood of negligent conduct on the part of the stevedoring contractor is always irrelevant in determining whether the vessel has breached its duty of due care." *Supra*, 610 F.2d at 125. Although the court did not state when the likelihood of negligent conduct would be relevant, several observations are in order. First, the holding suggests that the likelihood of a stevedore's negligent conduct is sometimes irrelevant. Second, the implication (the Court of Appeals refers the reader to §§ 302A and 302 of the Restatement (Second) of Torts) is that if the negligence is foreseeable, the owner would not be relieved of liability; conversely, if unforeseeable (*i. e.*, extraordinary) the owner would not be held to have breached its duty of care.

21. Thus if under *Griffith II* a more appropriate second interrogatory would have asked the jury to decide if the stevedore's acts constituted a superseding cause of the injury, the jury in fact answered that question by its response to the Interrogatory as originally formulated.

age, as opposed to the moisture content of the sugar itself caused the freezing. In this light, the jury was instructed at length as to the difference between mere speculation and a conclusion resting on reasonable inferences. T 3–55 through 58.[22]

4. *Loss of Earnings*

[12] Defendant's arguments that the jury's answers to Interrogatories Nos. 3(a) and 5 are "against the clear weight of the evidence"[23] should be directed to a motion for a new trial, and not for judgment notwithstanding the verdict.

B. Motion for New Trial[24]

The defendant asserts that I erred in my rulings that the stevedore's negligence was not at issue and that plaintiff's application for a union pension based on age and service was not admissible evidence; and that there was no jury charge on contributory negligence. I conclude that none of these assertions is a sufficient basis for granting a new trial.

1. *Stevedore's Negligence*

Negligence on the part of the stevedore does not necessarily relieve a negligent owner of liability. *Griffith II, supra*, 610 F.2d at 125. In this case negligence of the owner was not in dispute; the issue for the jury was causation: was the negligence of the owner the proximate cause of plaintiff's injuries. In this regard proof of the stevedore's negligence was irrelevant.[25] Defendant asserts that its defense, for factual consideration by the jury, was that the negligence of the stevedore was the sole proximate cause of the accident. Shipowner's Brief at 14. Defendant needed to show that the stevedore's acts or omissions, negligent *vel non*, were the sole proximate cause of plaintiff's injuries.[26] To this end the record shows full description and explanation of the stevedore's actions; in addition, defendant was permitted to cross-examine plaintiff and plaintiff's witnesses and to introduce evidence on its own about alternate methods of discharging a cargo of sugar. T 1–69 through 71, 1–81 through 90, 1–104 through 106, 1–122 through 124, 2–30

22. A case properly goes to the jury even if no facts are in dispute but there are conflicting inferences that may be drawn from them. *Phoenix Savings & Loan, Inc. v. Aetna Casualty & Surety Co.*, 427 F.2d 862, 868 (4th Cir. 1970).

23. Interrogatory No. 3(a) reads as follows:
Over what period of time, if any, would the plaintiff have worked gainfully in the future had it not been for the accident?
Interrogatory No. 5 reads as follows:
How much has the plaintiff lost in past earnings from the date of the accident until the present time as a result of the accident?

24. In accordance with the mandate of Rule 50(c) of the Federal Rules of Civil Procedure, I must rule on the motion for a new trial as well as the motion for judgment notwithstanding the verdict.

25. Whether the acts or omissions of the stevedore amounted to superseding cause thereby relieving the owner of liability has been discussed in the first part of this opinion. Suffice it to observe that superseding cause turns on the question of foreseeability (from hindsight) of the third party's acts and not on the negligence of those acts.
When defendant sought to introduce Occupational Safety and Health Act regulations (OSHA), 29 CFR § 1918.83 to establish the stevedore's negligence, I refused to admit them inasmuch as I held that proof of the stevedore's negligence was not relevant. T 2–164 through 165. Whatever duty of care the OSHA regulations impose on the stevedore does not relieve a vessel owner of the duty of care the Act imposes on it. House Report at 4704. When other courts have dealt with the impact of the OSHA regulations on vessel owners, the question has been whether the regulations impose a duty of care on the vessel, not whether breach of the regulations by a stevedore relieves a vessel of liability. *See Bachtel v. Mammoth Bulk Carriers, Ltd.*, 605 F.2d 438 (9th Cir. 1979); *Rich, supra; Chavis v. Finnlines, Ltd., O/Y*, 576 F.2d 1072 (4th Cir. 1978); *Gay v. Ocean Transport and Trading Ltd.*, 546 F.2d 1233 (5th Cir. 1977); *Blackburn, supra*. It is interesting to note that were we to follow those circuits that hold that the regulations impose a duty on the *vessel*, it is likely defendant would have been in the position of arguing to prevent their admittance into evidence.

26. Not only was defendant not required to prove that the stevedore's acts were negligent, but such proof might have been confusing to the jury, since such proof of stevedore's negligence would not have relieved the shipowner of liability.

through 31, 2–75 through 78, 2–89 through 91.[27]

[13] Defendant asserts that by submitting Interrogatory No. 2 to the jury, the stevedore's negligence was placed in issue even though defendant had not been permitted to introduce evidence as to that negligence. Interrogatory No. 2, as discussed above, went to the issue of the vessel owner's duty and whether that duty had shifted to a third party. In order to answer the interrogatory, the jury did not need to consider evidence of the stevedore's negligence. Even the conceded negligence of the stevedore would not necessarily bar recovery from the owner. Thus the ruling keeping out evidence of the stevedore's negligence and submission to the jury of Interrogatory No. 2 are not contradictory.

2. *Union Pension*

At the beginning of the trial the parties stipulated to the life expectancy and work life expectancy of a 64 year old male (age of plaintiff at date of accident) and a 66 year old male (age of plaintiff at time of trial). Defendant argued at trial that plaintiff would have retired at age 65, and therefore damages for wage loss should be cut off as of December 1977, plaintiff's 65th birthday. To this end, defendant introduced evidence as to the customary age of retirement in the longshoring industry. T 2–167 through 170. Defendant also elicited from plaintiff the fact that he had applied for and received a social security retirement pension not based on disability, T 1–132, before I sustained plaintiff's objection to further cross-examination on portions of plaintiff's pension application. T 1–132 through 136A; T 2–7 through 13.

[14] It is proper to prove damages by introducing evidence of plaintiff's earnings at the time of the injury and of life and work life expectancy. In this respect, the jury was free to accept or reject this evidence and mold the verdict according to its view of the work life expectancy and salary of the plaintiff.

[15] Plaintiff had applied for pensions after the accident and at a time when he was automatically eligible for a pension based on age without necessity of proving disability. After argument by counsel, I concluded that further cross-examination on the social security retirement pension and plaintiff's Union pension would be unduly prejudicial to plaintiff. T 1–135 through 136A, 2–7 through 13. I reaffirm that judgment. My reasons as then articulated seem to me sound on reflection:

> I think that under 403, under Federal Rule of Evidence 403 it may possibly have some relevance, but I think that the prejudice so outweighs the probative value of it.
>
> Here is a man who has been hurt and it is perfectly conceivable that he would contend that if he had not been hurt he would have continued to work for X number of years but once he got hurt he went on a, he thought, "Now that I am hurt it is time to retire," and I think that is all it proves.
>
> Whereas I think the effect on the jury may very well be to persuade them that he didn't intend to continue to work; that he is not working because of disability but because he is receiving a retirement and I think that the prejudice outweighs the probative value of the evidence.

T 1–135 through 136.

3. *Contributory Negligence*

Defendant filed a Supplemental Motion for a New Trial three days after the filing of the Motion for Judgment Notwithstanding the Verdict or New Trial and within the ten day period mandated by Rule 50 of the Federal Rules of Civil Procedure. This last document is not actually a supplemental

27. Indeed defendant's expert witness, Mr. Keeler, was permitted to testify as to whether in his opinion the method used by the stevedore was improper. T 89 through 91. This testimony (whether the stevedore's methods were proper as distinct from what those methods were) was admitted as evidence on the question of plaintiff's contributory negligence. T 2–165. *See* discussion of contributory negligence, *infra*.

motion, but rather a supplement to the original motion in the form of an additional reason for a new trial. Defendant asserts I erred in failing to submit to the jury the issue of plaintiff's contributory negligence.

[16] Although a defendant vessel owner cannot assert the contributory negligence of the stevedore to reduce a plaintiff longshoreman's recovery, *Edmonds, supra*, evidence of the contributory negligence of the plaintiff can be considered in mitigation of damages. *Edynak v. Atlantic Shipping, Inc. Cie. Chambon Maclovia S.A.*, 562 F.2d 215, 219 n.5 (3d Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978).

Rules 49 and 51 of the Federal Rules of Civil Procedure bear on this issue. Rule 49 regarding special verdicts and interrogatories states in relevant part that if in giving instruction to the jury on answering interrogatories,

> the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury.

The rule goes further and says that as to such issues omitted findings in accord with the special verdict are to be implied.

Rule 51 in pertinent part states:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.[29]

Defendant did not note his objections on this issue either during the framing and presenting of the interrogatories to the jury or in response to the charge, and has therefore waived his objection. *Holloway v. J. B. Systems, Ltd.*, 609 F.2d 1069, at 1074 (3d Cir. 1979). The question remains whether in spite of the failure to object, the absence of a charge on contributory negligence was so fundamental that it constitutes reversible error. *Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767, 772 n.12 and accompanying text (3d Cir. 1975); 5A Moore's Federal Practice § 51.04 at 51–9 (2d ed. 1979).

Defendant's expert, Mr. Keeler, testified as to a variety of tools that could have been used to discharge the cargo. This testimony was permitted as relevant to the issue of contributory negligence. T 2–78, 2–165. In most circumstances the question of contributory negligence by a longshoreman plaintiff, leading to a reduction of damages, is a question for the jury, *Lopez v. A/S D/S Svendborg*, 581 F.2d 319, 322 (2d Cir. 1978) and in this context the vessel owner is entitled to the most favorable reading of "all inferences which the evidence supports, even though contrary inferences might reasonably be drawn." *Chavis, supra*, 576 F.2d at 1083.

[17] However, where defendant has not met its burden, that is, it has failed to introduce sufficient evidence for a jury reasonably to find in its favor, it would be error for a judge to instruct a jury on the issue "for it allows the jury to *speculate* that in some way plaintiff's own negligence may have caused [the injury]" (emphasis added). *Id.* at 1082. Unlike the situation in *Chavis*, in this case there was no credible evidence from which the jury could have concluded that use of the suggested alternative tools was feasible, and I so charged the jury:

> There have been suggestions of the use of a pick or of a hammer or of a pneumatic drill, but I have heard no evidence from anybody, I have heard argument but I have heard no evidence from anybody that any of those methods were feasible under the circumstances that there were here.

29. It should be noted that defendant not only did not object to the jury instructions in timely fashion, but in the supplement to his motion where he advances the omission of the contributory negligence charge (and interrogatory) as error, he fails to state the grounds for his objection in accordance with the rule.

T 3–60.[30] As a matter of law I conclude defendant has not made out a case of contributory negligence on the part of plaintiff. Thus defendant cannot prevail even under the fairness test principle that operates to mitigate the harsh effect of Rules 49 and 51.

For the foregoing reasons I deny defendant's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, and an order will be entered accordingly.

Floyd C. LESTER, Plaintiff,

v.

UNITED STATES of America, Defendant.

Civ. A. No. CA–1–76–54.

United States District Court,
N. D. Texas,
Abilene Division.

March 20, 1980.

Husband, individually and on behalf of the community estate of himself and his wife, brought suit against the United States to recover damages for personal injuries sustained by the wife in a fall on the naval base where the husband was stationed. The District Court, Woodward, Chief Judge, held that: (1) the marital domicile of the husband and wife was Texas; (2) the laws of Guam governed the question whether the United States was liable for any negligent acts; (3) under Guam law, the United States, acting through the United States Navy, was negligent in maintaining a flight of stairs and such negligence proximately caused injuries sustained by plaintiff's wife when she slipped while using the stairs in the exercise of ordinary care for her own safety; (4) there was sufficient compliance with the administrative claim provisions of the Federal Tort Claims Act; (5) the tolling provision of the Soldiers' and Sailors' Civil Relief Act was applicable; (6) the community property laws of Texas applied to any award of damages; (7) under Texas law, the husband could not bring action on behalf of the community estate to recover for his wife's personal injuries; (8) the husband could not bring suit on behalf of the community estate to recover the sole management community property of the wife; (9) the claim for the wife's lost earning capacity was denied; (10) any recovery for future medical expenses was denied; (11) the husband was entitled to $50,000 for loss of consortium; and (12) any loss of earnings and reduction of retirement benefits suffered by the husband as a result of his decision to retire early from the Navy was not proximately caused by the government's negligence.

Ordered in accordance with opinion.

1. Divorce ⇐62(1)

Despite travels of husband and wife while husband was in the United States Navy, marital domicile of the couple was Texas where the husband was a native of Texas and his mother and father resided in Texas and where the couple lived in Texas when they filed suit against the United States and, at all times pertinent to the suit, the couple had intended to live in and claim as their domicile and residence Abilene, Taylor County, Texas.

2. United States ⇐78(16)

Question whether the United States was liable under the Federal Tort Claims

30. Mr. Keeler also testified about alternative methods of discharging the cargo, T 2–83 through 85, 2–90 through 91, as distinct from tools used by the longshoremen. The methods of discharging cargo that he described are the responsibility of the stevedore and not a person in plaintiff's capacity, and therefore are not relevant to the issue of plaintiff's contributory negligence, if any.